IN THE

Supreme Court of the United States

October Term, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION,
Appellant,

v.

EL PASO NATURAL GAS COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JOINT PETITION FOR RECONSIDERATION AND FOR HEARING ON THE MERITS

of

CASCADE NATURAL GAS CORPORATION, CALIFORNIA-PACIFIC UTILITIES COMPANY, INTERMOUNTAIN GAS COMPANY, THE WASHINGTON WATER POWER COMPANY, AND WASHINGTON NATURAL GAS COMPANY, *Appellees*.

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Cascade Natural Gas Corporation, California-Pacific Utilities Company, Intermountain Gas Company, The Washington Water Power Company, and Washington Natural Gas Company, *Appellees.*

NOW COME Cascade Natural Gas Corporation, California-Pacific Utilities Company, Intermountain Gas Company, The Washington Water Power Company, and Washington Natural Gas Company, intervenors in the case below and Appellees herein, and respectfully jointly pray the Court to grant reconsideration of the majority decision rendered in this cause on June 16, 1969. The grounds upon which this petition is based are as follows:

I. The Majority Erred in Deciding the Merits of the District Court's Decree and Prescribing New Divestiture Standards Without Giving the Parties an Opportunity to Submit Briefs on the Merits and the Issues Involved

The fundamental error of the majority decision (which must have led to the other errors discussed herein) was in vacating a carefully prepared District Court decree which was in full compliance with this Court's mandate in *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967) *(Cascade),* without having first accorded the parties who devoted 57 days in the trial of this case an opportunity to submit briefs or oral argument on the merits of that decree. New issues have been raised by the majority opinion which were not even suggested by the jurisdictional statement of the Utah Public Service Commission (Utah) and which were not noted for argument before this Court on April 29, 1969.

As the record shows, the posture of this case just prior to the notice of April 21, 1969 was as follows:

Utah filed a jurisdictional statement which attacked the District Court's decree on the single ground that Colorado Interstate Corporation's (CIG) acquisition of the Northwest Division properties of El Paso Natural Gas Company (El Paso) would be a violation of Section 7 of the Clayton Act. Utah's jurisdictional statement did not attack the *plan or method of acquisition* of the assets of El Paso's Northwest Division, or the completeness of the severance of the two systems which would result. It was limited solely to the allegation that the acquisition by CIG would lessen competition or tend to create a monopoly.

Appeals by the United States, The People of the State of California and Southern California Edison Company had been initiated but were withdrawn in January, 1969 without having been perfected.

On or about February 24, 1969, Utah filed a motion to dismiss its appeal. At that time no other party had filed any documents or briefs except the motion to affirm the District Court's decree filed by Southern California Gas Company and Southern Counties Gas Company. Thus, at the time of Utah's motion to dismiss its appeal all parties to these proceedings were satisfied that the District Court's decree was in full compliance with this Court's mandate in *Cascade*.

Some time in March or April of 1969, a Mr. William Bennett and two others, none of whom was or is a party to these proceedings, filed some documents attacking Utah's motion to dismiss its appeal. Mr. Bennett requested that he be appointed to represent the public. These documents were never served on these petitioners.

By letter dated April 21, 1969, the Clerk of this Court advised all parties as follows:

> "The Court today entered the following order in the above case:
>
> "'The motion of appellant to dismiss the appeal under Rule 60 and the motion of William M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires. Mr. Justice Harlan and Mr. Justice Stewart dissent, believing that the action taken by the Court abuses its own processes. See Rule 60. Mr. Justice White, Mr. Justice Fortas and Mr. Justice Marshall took no part in the consideration or decision of this matter.
>
> Very truly yours,
>
> JOHN F. DAVIS, *Clerk*
> By E. T. LYDDANE.
> *Assistant Clerk*'"

This brief notice was received by your petitioners herein not earlier than April 23, 1969. Thus, all parties receiving the above notice were given at the most seven (7) days' notice of an oral argument limited to two procedural questions, to-wit:

(1) The motion of Utah to dismiss its appeal under Rule 60; and

(2) The motion of Mr. Bennett.

The only party invited by this notice to submit a brief was the Solicitor General. By arrangements with the Clerk of this Court all parties, including the Solicitor General, El Paso, CIG and petitioners were allotted in total but one hour to argue the above two issues before the Court. Mr. Bennett, on the other hand, was allocated an hour to present his views.

No party was notified, advised, or requested by the Clerk or by order of the Court to submit briefs or to present oral argument on any of the following issues, all of which are inherently involved in the majority opinion:

(1) Whether the plan and method of acquisition ordered by the District Court complied with this Court's mandate in *Cascade.*

(2) Whether a "cash sale" was the only method under *Cascade* to accomplish "complete divestiture."

(3) Whether the majority's conclusion that an "assumption" of $170,000,000 of El Paso's indebtedness by New Company is the actual method and means of financing its debt capital approved by the District Court's decree.

(4) Whether New Company must be compelled to

finance its debt portion of the acquisition at current high interest rates, and is therefore not entitled to take advantage of "rolling over" that portion of the existing low cost debt attributable to the properties to be divested.

(5) Whether an allocation to New Company of additional reserves beyond the division found by the District Court to be "equitable" is required to meet the mandate of *Cascade*.

It would appear reasonable and fair that had this Court on April 21, 1969 intended that, as a result of the oral argument set April 29, 1969, the above issues would be raised by the Supreme Court and a new and different divestiture mandate created, the parties would have been given the right to submit briefs on these issues with reference to the full record, and to present oral argument.

Instead, the majority precipitously rendered their decision creating new divestiture guidelines at variance with *Cascade*, all without any notice to the parties and without the benefit of briefing or argument by the parties. The majority's lack of familiarity with the record before the Court is illustrated by the following quotation from the opening of Part II of the Opinion:

> "Our mandate directed complete divestiture. The District Court did not, however, direct complete divestiture. Neither appellants nor any party supporting the dismissal argues that the District Court did so. Rather they argue that the disposition made by the District Court was the best that might be made without complete divestiture." (slip opinion, p. 6)

To the contrary, these petitioners in their Joint Motion to Affirm or Dismiss, page 3 (filed herein upon entry of this Court's order of April 21, 1969) contended that:

> "Acquisition of El Paso's divested properties by CIG will fully comply with the mandate and the guidelines respecting divestiture without delay hitherto ordered by this Court."

Also in our Statement of Position filed for the Argument on April 29, 1969, we said:

> "We respectfully submit that divestiture has been accomplished by the District Court in meticulous compliance with the mandate of this Court in *Cascade*." (p. 3)

The Solicitor General, in the Appendix to his Memorandum in response to the order of April 21, 1969, referred in detail to the restrictions upon conversion of the preferred stock which would insulate the New Company and CIG from El Paso and would result in a "complete divestiture." (pp. 8-9)

Further, at page 11 of the Appendix:

> ". . . The terms of the divestiture plan fully comply with and implement the guidelines set forth in this Court's *Cascade* opinion (see the Statement, *supra*, pp. 4, 7-10). . . ."

And at page 17 of the Appendix:

> ". . . The divestiture approved by the district court would create a strong and viable potential competitor for the California market upon terms that meet the standards for divestiture announced by this Court in *Cascade*. . . ."

See also Memorandum of Colorado Interstate Corporation, page 6, stating that the District Court decision conforms to the mandate of *Cascade*.

The majority decision was premature for the further reason that the record before this Court was not complete at June 16, 1969. We are informed that the Imple-

menting Documents filed in the District Court August 10, 1968 and approved by the Court in its final order entered November 7, 1969, have not been transmitted to the Supreme Court as of the date hereof. The significance of this deficiency in the record before this Court is illustrated by the following quotation from (slip opinion, p. 3) the majority decision:

> "Under the plan approved by the District Court, El Paso receives 5,000,000 shares of New Company nonvoting preferred stock, convertible into *common stock* at the end of five years. *What the conversion ratio* will be is *not known;* but, *it is said,* there will be provisions to restrict El Paso control over the New Company." (Emphasis added)

The obvious reason for the uncertainties italicized above is that the Implementing Documents were apparently not available.

The conversion ratio of 0.35 shares of *Colorado Interstate* common stock (not New Company, as the majority opinion implies) for each share of New Company preferred is set out precisely at page 13 of Exhibit III of the Implementing Documents. The elaborate and conclusive restrictions against conversion of this preferred stock by El Paso or its officers, directors or certain stockholders are set forth at pages 25 to 27 of the same Exhibit and the Restrictive Provisions filed as the last document of the Implementing Documents. Had the record in this Court been complete, there would have been no reason for the supposition of these deficiencies by the majority.

The Implementing Documents demonstrate that the plan of divestiture ordered by the District Court, employing non-voting preferred stock, would result in a com-

plete severance of control of New Company by El Paso in accordance with *Cascade*. They show that the District Court's decree complies fully with the mandate in *Cascade* wherein this Court stated, with reference to the issue of stock for assets, the requirement that the plan must:

> ". . . make sure that the New Company's stock does not end up controlled by El Paso interests. . . . and conditions must be imposed to make sure that El Paso interests do not acquire a controlling interest. . . ." (386 U.S. at 141)

The Implementing Documents contain those very conditions which ensure that El Paso does not acquire a controlling interest.

The majority rely upon *United States v. du Pont & Co.*, 366 U.S. 316 (1961) *(du Pont)*, for their decision that "complete divestiture" cannot be achieved except by a cash sale. In *du Pont*, the company's divestiture plan, which was rejected by this Court, would have permitted du Pont to retain all attributes of ownership of the General Motors stock, including the right to receive dividends and a share of assets on liquidation, except the right to vote. Voting rights were to be "passed through" to the du Pont stockholders. At 366 U.S., page 331, the Court pointed out that two thirds of du Pont's General Motors stock would be voted by du Pont shareholders (upwards of 40 million shares), the du Pont shareholders would be, *ipso facto*, General Motors voters whose interest would be to vote in such a way that General Motors would favor du Pont and thus the "intercorporate community of interest" would be continued.

Under the District Court's decree herein, the New

Company stock to be issued to El Paso would be *non-voting* preferred, convertible to common voting stock of *CIG* only by a holder who is not an officer or director of El Paso, does not own or have voting power of more than ½ of 1% of El Paso common stock outstanding and meets certain other restrictive conditions (Implementing Documents, Restrictive Provisions). El Paso would have only the non-voting preferred stock with a limited dividend and no power, directly by itself, or indirectly through its own stockholders, to control New Company so as to favor El Paso. Thus the deficiencies of the du Pont plan, which relied solely on divestiture of du Pont's own voting rights, are not present in the District Court's decree in this case.

Another vital distinguishing factor not present in *du Pont* is that here El Paso, CIG and New Company will all be under the continuing jurisdiction and surveillance of the Federal Power Commission which will protect the public interest in all markets in which they will serve.

Your petitioners who are local distributors of natural gas in the Pacific Northwest and now secure their gas supplies from El Paso and will ultimately depend upon New Company for their gas supplies urge this Court to reconsider this case and set the matter for hearing after first giving all parties adequate opportunity to submit briefs on the merits and the issues raised by the majority's opinion as set forth earlier herein.

II. The Majority Erred in Changing Its Cascade Guidelines for Divestiture by Prohibiting New Company from "Rolling Over" the Debt and Requiring a Cash Sale

In *Cascade* this Court set forth the guidelines for divestiture of El Paso's Northwest Division properties.

None of these guidelines required a cash sale. None of the guidelines in *Cascade* prohibited New Company from taking advantage of that portion of the low-cost imbedded debt of El Paso attributed to the Northwest Division. Neither the District Court nor the attorneys for the 24 parties before the District Court interpreted *Cascade* to require a "cash sale" or to prohibit a debt "roll over."

The majority opinion, written without the benefit of the entire record, briefs or oral argument, in creating two new guidelines, stated as follows:

> "Retention by El Paso and its stockholders of the preferred stock is perpetuation to a degree of the illegal intercorporate community. Assumption of \$170,000,000 of El Paso's indebtedness helps keep the two companies in league. The severance of all managerial and all financial connections between El Paso and the New Company must be complete for the decree to satisfy our mandate. Only a cash sale will satisfy the rudiments of complete divestiture." (slip opinion, p. 7)

A. *The Error in Regard to Assumption of Indebtedness.*

The majority opinion states as follows:

> "Assumption of \$170,000,000 of El Paso's indebtedness helps keep the two companies in league."

This statement is subject to the construction that New Company cannot now utilize the same bond and debenture holders of El Paso and thereby obtain the advantage of El Paso's existing interest rates on its bonds and debentures, thus precluding New Company from obtaining an effective interest rate of 5.5%. If this is the interpretation to be placed on this unfortunate statement, it simply means that New Company, to accomplish a divestiture,

would have to sell $158,000,000 (not $170,000,000)[1] of new pipeline mortgage bonds and debentures at the current rate for such bonds and debentures, which rate is no less than 8.5% and could be as high as 9% for a new and unseasoned company.

If New Company is required to sell its bonds at current interest rates as referred to above, instead of being able to "roll over" a portion of El Paso's indebtedness, the impact on New Company as well as on the gas purchasers in the Pacific Northwest will be severe. The economic result would simply be to add approximately $5,000,000 to New Company's interest charges each year.[2] This follows because the interest rate on $158,000,000 of debt under a debt "roll over" method would be 5.5% as opposed to 8.5 to 9%[3] if the majority intended that a debt "roll over" be prohibited.

The record before the District Court demonstrated that under the District Court's plan of divestiture, New Company's annual interest charges would be approximately $8,690,000 per year on a "roll over" basis. Under the majority opinion, if New Company cannot take advantage of the "roll over" of debt at 5.5% the annual interest cost to New Company jumps to about $13,430,000 per year representing the annual interest cost at 8.5%. It is inconceivable that the majority opinion intended such an interpretation to follow from its statement that the "as-

1. The Implementing Documents (Exhibit IV, p. 2, line 7) show the debt portion at April 30, 1968 was equal to the tax basis of the properties to be divested which amounted to $158,000,000.

2. This figure and other figures showing the economic effect of the majority opinion are not in the record as such, but can be computed from figures which are in the record.

3. The Court may take official notice of the prime interest rate.

sumption of $170,000,000 of El Paso's indebtedness helps keep the two companies in league." This great increase in interest costs is not necessary to accomplish a "complete divestiture" for the "roll over" of debt would not keep the two companies "in league" as the majority stated.

Notwithstanding the majority opinion's statement quoted above, the evidence shows that New Company is not "assuming El Paso's indebtedness." The words "assumption of indebtedness" are an erroneous description of the facts and contrary to the actual method approved by the District Court.

The testimony before the District Court and the Implementing Documents approved by the District Court as part of the plan of divestiture between El Paso and CIG show there is neither in law nor in fact an "assumption" by New Company of El Paso's indebtedness. The fact is that New Company will issue debentures and bonds aggregating $158,000,000 in its own name and New Company will execute a mortgage indenture in its own name with the bondholders. El Paso's debentures and bonds in the same amount and its mortgage on the assets to be divested will be satisfied, so that El Paso will not have any continuing liability or connection with New Company.[4] Thus, there will be no "assumption" of indebtedness by New Company but in fact there will be a substitution or novation. The fact that New Company and El Paso will have the same bondholders is of no consequence as many utilities, gas, electric or telephone, sell their bonds to the same buyers, just as they may use some of the same banks for short term loans.

4. See Implementing Documents, Part I, pp. 10-12.

We therefore urge the Court upon reconsideration to clarify and change its opinion in such a way as to make clear that there is no restriction intended prohibiting New Company from "rolling over" the debt so that it and its consumers may take advantage of the lower 5.5% interest rate available under the "roll over" of debt.

B. ***The Error of the Majority in Requiring a Cash Sale.***

If a cash purchase of the assets is required (assuming at this point the debt "roll over" is acceptable), New Company would require approximately $6,800,000 additional annual revenue to earn a fair rate of return on its investment. These added revenues would have to be supplied by the gas purchasers of New Company as they will be the source of New Company's revenue.

The adverse impact on these purchasers will be even more damaging if *both* new divestiture requirements, to-wit: a "cash sale" and the restriction against taking advantage of the "roll over" debt of 5.5% are imposed. Under these two new requirements, CIG (or any applicant for acquisition) would be selling its common stock to raise up to $105,000,000 to acquire funds to purchase the equity portion of the assets and issuing $158,000,000 of its bonds and/or debentures to take care of the debt portion. The debt portion, as previously noted, could not be secured currently at less than an interest rate of about 8.5%. The result is that even if such a scheme of divestiture could be financed, New Company would then require from the Federal Power Commission approval of a rate of return sufficient to produce additional revenue of at least $11,000,000 a year over existing revenue. This additional $11,000,000 a year would be needed to pay a

fair return on the common stock and to pay the higher interest charges required.

The impact of the majority opinion discussed above demonstrates that the purpose of divestiture could be frustrated and defeated. As pointed out in *Cascade,* the purpose of divestiture was to create a "viable" new company capable of competing for the California market, and at the same time render adequate service to the Northwest customers. Under the majority opinion of June 16, 1969, New Company, assuming it could finance the divestiture, would not be a "viable" company capable of financing a competitive new project to serve the California market.

If divestiture is to be accomplished so that a new company will be a "viable entity" capable of performing its responsibilities in the Pacific Northwest and providing competition for the California market, reconsideration must be granted to afford the Court an opportunity to review its June 16, 1969 decision. This Court should set the case for hearing preceded by briefs from the parties related to the record and facts upon which the District Court predicated its decision, and to the new issues created by the majority opinion.

III. The Majority Erred in Requiring Reallocation of Reserves at Variance with *Cascade*

The majority opinion extends *Cascade's* guidelines respecting divestiture of gas reserves without adequate definition or consideration of the effects thereof.

This Court stated clearly in *Cascade* that the new gas reserves developed since the merger of Pacific Northwest

Pipeline Corporation into El Paso must be equitably divided between El Paso and the New Company. The record before the District Court upon which it made an "equitable division" of such reserves is voluminous and highly technical. Its decision is based on the premise, stated by this Court in *Cascade,* and repeated in the majority opinion (slip opinion, p. 5) that the object of allocation of gas reserves must be to place New Company in the same relative competitive position *vis-a-vis* El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger.

There is no finding in either *United States v. El Paso Natural Gas Company,* 376 U.S. 651 (1964), or in *Cascade* that the reserves which Pacific Northwest had in 1957 were in fact sufficient to mount a pipeline project to California which would warrant certification by the Federal Power Commission. The two decisions are based on the fact that Pacific Northwest was a competitive factor in the California market merely because it had the *probable* capability of entering that market. Until the majority decision of June 16, 1969, this Court, the District Court and all parties have been concerned with "the probabilities and not certainties," posing a threat of competition for the California market. *United States v. El Paso Natural Gas Company, supra,* at page 658, quoting from *Brown Shoe Co. v. United States,* 370 U.S. 294, 323. It is in this context that the lower court formulated its equitable division. Neither *Cascade* nor the District Court intended or required an instant, full-fledged, *de facto* competitor in California as the new mandate of this Court appears to require. The requirement was that New Company have reserves reasonably

comparable to those Pacific Northwest Pipeline Corporation might have been expected to have acquired on its own, and to constitute a reserve nucleus which, by aggressive supplementation during a reasonable period after initiation of its operations, would form the basis for a project by New Company to bring competitive gas to California.

Nowhere does the majority determine that the District Court's decision was inequitable, nor does any party to this case so argue, nor did Utah so contend in its Jurisdictional Statement. The majority opinion simply states that the reserve position of New Company must be strengthened, but no specific guidelines as to the extent or manner thereof are prescribed. We submit the allocation of reserves by the District Court was consistent with *Cascade* and should not be changed. The majority erred in trying to reallocate reserves without the benefit of briefs and references to the record. Its opinion therefore raises many new questions pertaining to reserves. For example: Does this Court intend that New Company must have sufficient San Juan reserves to immediately undertake a project to California? If the additional reserves to be allocated to New Company shall prove to be less than adequate for a California project, must those reserves now dedicated to service in the Pacific Northwest be diverted to a California project, thereby impairing New Company's ability to serve the Pacific Northwest? These are but a few of the questions which immediately come to mind, strongly suggesting extensive further confusion and delay in the attempted carrying out of this Court's new mandate, with likely further appeals thereafter.

We are not here dealing with the relatively simple consequences impinging on a relatively small number of individual stockholders, as was the case in *United States v. du Pont & Co., supra.* We are here dealing with fully regulated companies engaged in public service upon whose resources and capabilities the interest and welfare of countless ultimate customers for natural gas service are dependent. The consequences of a decision rendered without full and complete consideration of the interests of all parties concerned can and will have far-reaching adverse effects.

CONCLUSION

The result of the majority's decision is that it is impossible to comply with it without unnecessarily inflicting a harsh impact upon all who will be affected by it.

The fundamental objectives of the divestiture, as clearly delineated in *United States v. El Paso Natural Gas Company, supra,* and *Cascade,* are to restore a competitive force in the California market by a viable new company which would be able to adequately serve the existing Northwest customers. This court never intended, in its prior decisions, that the new company to emerge from the divestiture should be immediately able to sell natural gas in California, as the majority obviously now intends. Nor was it the intent that the new company should start its existence with such a financial handicap that its customers in the Northwest would be immediately subjected to increased costs that would inevitably result from the new requirements of the majority's decision regarding debt and equity financing.

The decision in *Cascade* is clear that acquisition of the

divested assets may be paid for in stock, so long as there is an immediate termination of El Paso's control over them. The District Court's decree and the comprehensive restrictions upon ownership of stock directly or indirectly precluding control of New Company by El Paso, its officers, directors and stockholders ensure that result. The decision in *du Pont* does not preclude an acquisition by issuing stock if adequate restrictions are imposed and the fact that El Paso, CIG and New Company will be subject to the continuing jurisdiction of the Federal Power Commission will add an assurance, not present in the *du Pont* case, that the activities of each must clearly serve the public interest.

The District Court decision, so carefully in tune with *Cascade*, which balanced the interests of consumers in the Pacific Northwest, New Company, and the potential customers in California, should not be disturbed until this Court has an opportunity to study the briefs of the parties on the merits and on the impact of the majority opinion of June 16, 1969. Upon a full hearing and a review of the complete record the decision of the District Court should be affirmed.

To the end that there may be a successful divestiture, fulfilling the purpose of Section 7 of the Clayton Act, these petitioners respectfully submit that this court should take the following action:

1. Immediately stay further proceedings and withhold any mandate to the District Court.

2. Grant this Petition for Reconsideration and set the case for hearing before the Court, on the merits, with full

opportunity to all parties who have a true interest in the proceedings to submit briefs and oral arguments.

3. After hearing, affirm the decree of the District Court.

Seattle, Washington
July 8, 1969

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Richard B. Hooper, one of the attorneys for the appellee-petitioners named herein, certify that this petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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